Filed 12/19/08 Cesaro v. Quinn Emmanuel et al. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOSEPH CESARO et al., Plaintiffs and Appellants, v. QUINN EMANUEL URQUHART OLIVER & HEDGES et al., Defendants and Respondents.	B200220 (Los Angeles County Super. Ct. No. BC 351770)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles C. Lee, Judge. Affirmed.

Appleton, Blady & Magnanimo and Frank A. Magnanimo for Plaintiffs and Appellants.

Quinn Emanuel Urquhart Oliver & Hedges, Eric J. Emanuel and Christopher E. Price for Defendants and Respondents.

* * * * * *

The law firm of Quinn Emanuel Urquhart Oliver & Hedges, LLP and three of its attorneys, Harold A. Barza, David W. Quinto and Kristen Bird (respondents), moved to dismiss, under section 425.16 of the Code of Civil Procedure,[1] an action brought by Joseph Cesaro and Sunday Funnies, LLC (appellants) against respondents. The trial court granted the motion and dismissed appellants' action. We affirm.

Appellants' action is in substance one for the malicious prosecution of a civil action wherein respondents represented the plaintiff in that previous action against appellants, who were the defendants in that previous action. We first set forth the procedural history of that previous action.

THE PREVIOUS ACTION

Mirage Animation doing business as Great American Ink (Mirage) brought an action against appellants[2] in August 2002 for misappropriation of trade secrets and inducing breach of contract. Mirage and appellants were in the business of buying and selling animation art. The trade secrets that appellants allegedly misappropriated were identities, telephone numbers, addresses and other information about Mirage's clients.

Mirage, represented by respondents, brought an application for a temporary restraining order and a preliminary injunction, both of which were granted, the latter on October 29, 2002. The injunction enjoined Sunday Funnies from soliciting any individual or entity that was a client of Mirage before a certain employee (Neil Gonsier) stopped working for Mirage. (Gonsier went to work for Sunday Funnies after his employment with Mirage.)

On January 2003, Mirage filed an application for an order to show cause why appellants should not be held in contempt for violating the preliminary injunction. After the court considering the contempt citation found that Mirage had made out a prima facie

---

1 This is the statute providing for dismissals of strategic lawsuits against public participation (SLAPP).

2 We continue to refer to the defendants in the previous action as "appellants" for clarity's sake.

case that appellants had violated the terms of the injunction by soliciting Mirage's clients, but while the contempt proceedings were still pending short of a final resolution, appellants filed a motion to disqualify respondents as Mirage's counsel. Although Mirage contested the motion to disqualify respondents, they voluntarily withdrew as counsel for Mirage. On May 3, 2004, after respondents had withdrawn, the court dismissed the order to show cause re contempt.

The previous action was settled. Under the terms of the settlement, the court entered a permanent injunction against appellants prohibiting appellants from using Mirage's confidential information and from contacting Mirage's customers.

THE PRESENT ACTION

Appellants' complaint recounts in 35 pages and 221 numbered paragraphs the bitter history of the dispute and litigation between Mirage and appellants. No purpose would be served by recounting the minutiae of this struggle, which is, for the most part, evidence and not ultimate fact.[3] Accordingly, we proceed to summarize the *pertinent* ultimate facts as they are stated in the eight causes of action of this complaint.

The first three causes of action are all for malicious prosecution. The first cause of action alleges that the contempt proceedings brought in the previous action were based on false evidence propounded by Gonsier and that respondents knew that this evidence was false. The second cause of action alleges that respondents *maintained* the contempt proceedings even though they became aware of the fact that Gonsier's testimony was false. Both the first and second causes of action allege that the contempt proceedings were brought with malice and for the purpose of causing appellants financial and emotional harm. The third cause of action alleges, in substance, that respondents brought the previous action without probable cause and with the intent, and for sole purpose, of

---

[3] We refer to the venerable case of *Green v. Palmer* (1860) 15 Cal. 411, 415, quoting from the pleading manual authored by David Dudley Field: "The *facts* must be carefully distinguished from the *evidence* of the facts. The latter pertains to the trial, and has no place in the pleadings." This is as authoritative today as it was when *Green v. Palmer* was decided. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 392, p. 529.)

causing appellants financial and emotional harm. This cause of action alleges that the previous action terminated favorably to appellants.

The fourth cause of action is for abuse of process and alleges that respondents used the legal process to inflict financial and emotional harm on appellants. Exemplary of evidentiary allegations in this cause of action is that respondents propounded "frivolous positions at every opportunity." Other alleged instances of misconduct committed during the litigation was reliance on perjured testimony and naming Herman Rush of Royal Animated Art, Inc., as a defendant in the action against appellants. (Rush was allegedly a personal and professional friend of appellant Cesaro; the relationship between Cesaro and Rush allegedly deteriorated after Rush was named as a defendant. The complaint also alleges that soon after Rush was named as a defendant, he was dismissed from the action pursuant to a settlement.)

The fifth cause of action is for tortious interference with appellants' business relationship with Rush of Royal Animated Art and luring away Alex Krimskiy from appellants' employment and having Mirage employ Krimskiy. This cause of action also alleges that respondents persuaded Krimskiy to withhold propriety information from appellants. The gravamen of this cause of action is naming Rush as a defendant. It is unclear on what basis respondents can be liable for Mirage hiring Krimskiy.

The sixth cause of action alleges that during Rush's deposition, respondents disclosed a confidential settlement agreement.

The seventh cause of action is for intentional infliction of emotional distress in that respondents allegedly abused the litigation process for the purpose of inflicting severe emotional and financial pain on appellants.

The eighth cause of action is against the law firm of Quinn Emanuel etc. for negligent supervision of the three individual respondents and is predicated on the alleged misconduct of the three individual lawyers in the litigation against appellants.

THE TRIAL COURT'S RULING

The trial court found that the first of two requirements[4] of a SLAPP action was met in this case in that "all of the conduct which forms the bases for [appellants'] claims in this case were either made before the court in [Mirage's action against appellants] or were made in connection with the issues under review in that case."

With reference to the third cause of action, which alleged that Mirage's entire action was maliciously prosecuted, the trial court found that the requirement that the underlying action terminated favorably to the malicious prosecution plaintiff was not satisfied. The court found that Mirage's action was terminated by a negotiated settlement that included an injunction precluding the use of confidential information obtained from Mirage. Citing *Ferreira v. Gray, Cary, Ware & Freidenrich* (2001) 87 Cal.App.4th 409, 413, the court also held that a negotiated settlement does not amount to favorable termination.

The trial court, relying inter alia on *Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 638,[5] ruled that a malicious prosecution action cannot be predicated solely and exclusively on a contempt proceeding. Thus, the trial court found that appellants could not prevail on the first and second causes of action.

As far as the remaining five causes of action were concerned, the trial court found that all of them arose from the maintenance of Mirage's action against appellants. The

---

[4] The first test is whether the claim arose from an act in furtherance of the right of free speech; the second is whether the plaintiff has shown a probability of success on the merits. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)

[5] "To permit a malicious prosecution action when a party has chosen contempt over one of the other sanctions would inject into the choice of sanctions an element unrelated to the appropriateness of the sanction. Furthermore, the statutory discovery scheme itself provides a sanction if contempt is chosen without justification. Monetary and contempt sanctions against an attorney are authorized if the attorney engages in conduct that is a misuse of the discovery process." (*Lossing v. Superior Court, supra*, 207 Cal.App.3d at p. 638.)

trial court concluded that all of these causes of action were barred by the litigation privilege.

In sum, the trial court granted the SLAPP motion because appellants were unable to show that it was probable that they would succeed on the merits of their action. (See fn. 4, *ante*.)

DISCUSSION

1. A Settlement Is Not a Favorable Termination for the Purposes of a Cause of Action for Malicious Prosecution

Appellants contend that since Mirage paid them an undisclosed amount to settle the case, we should decline to follow the rule that a settlement does not constitute favorable termination for the purposes of a malicious prosecution cause of action. Appellants contend that, by paying to settle the case, "Mirage effectively conceded its lawsuit did not have merit ***and*** that it caused [appellants] significant harm." (Italics and boldface in original.)

We cannot agree with the premise that the settlement was a concession on the part of Mirage. The permanent injunction, which was part of the settlement, prohibited appellants from using, possessing or disclosing any of Mirage's clients' confidential information for 20 years and also prohibited appellants from initiating or pursuing any communication with anyone on what was denominated the "Gonsier Contact List" for eight years.

Given the objective of Mirage's action against appellants, this looks like a mission accomplished for Mirage. The fact that appellant Cesaro has stated in his own declaration that the injunction made no difference to him because he was out of business does not detract from the circumstance that Mirage achieved what it wanted, i.e., the long-term protection of the stipulated injunction.

In any event, there are good reasons why a settlement is not tantamount to favorable termination. By definition, a settlement requires each side to surrender some of its aims, resulting in an opaque mix of objectives gained and objectives compromised. This settlement is certainly no exception. We cannot even know the amount that Mirage

paid appellants since that part of the settlement is confidential but we are ready to assume that it was more than a nominal sum. On the other hand, there are the terms of the permanent injunction, which certainly represent a defeat for appellants and a victory for Mirage. Thus, as in most settlements, the termination by settlement does not reflect the merits of the action itself.

"Because the tort of malicious prosecution has a potential chilling effect on the willingness of persons to report crimes or pursue legal rights and remedies in court, its requirements must be strictly enforced." (*Ferreira v. Gray, Cary, Ware & Freidenrich, supra*, 87 Cal.App.4th at p. 413.) "In order to maintain an action for malicious prosecution, the plaintiff must first demonstrate that there was a favorable termination of the underlying litigation. [Citation.] This requirement is an essential element of the tort of malicious prosecution, and it is strictly enforced. [Citation.] Where the underlying litigation ends by way of a negotiated settlement, there is no favorable termination for the purposes of pursuing a malicious prosecution action." (*Id.* at pp. 412-413.) The last part of this rule has the endorsement of our Supreme Court (*Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782, 794, fn. 9) for the good reason that, as in this case, a settlement does not reflect the merits of the action. And it is, of course, basic that it is only when an action has been demonstrated to be *without merit* that there is a cause of action for malicious prosecution.

Thus, we reject appellants' contention that the trial court erred in concluding that the settlement of Mirage's action did not constitute favorable termination.

2. The Contempt Proceeding Cannot Be the Subject of a Cause of Action for Malicious Prosecution

Appellants contend that the trial court erred in concluding that the contempt proceedings could not support the two causes of action for malicious prosecution. Appellants contend that the contempt proceeding was a "separate proceeding" that was instituted and prosecuted maliciously.

The considerations that preclude recourse to a contempt proceeding in a malicious prosecution action has been maliciously instituted have been set fully set forth and

explained in *Lossing v. Superior Court, supra*, 207 Cal.App.3d 635, and need not be repeated here. The most persuasive points appearing in *Lossing* are that allowing a malicious prosecution action based on contempt proceedings would create a conflict between the attorney and the client in the underlying action and would also create a dilemma for the attorney in the underlying action. The conflict could arise if the attorney would have to disclose the contents of his file in the underlying action in order to defend against malicious prosecution. The dilemma would be created by the lawyer's responsibility to vigorously represent the client, a responsibility that would be chilled by the fear of a malicious prosecution action. (*Lossing v. Superior Court*, *supra*, 207 Cal.App.3d 635, 639-640.) For these as well as other reasons we find it unnecessary to repeat here, the court in *Lossing* concluded: "Given that a statutory remedy is available and malicious prosecution is a disfavored cause of action, we conclude contempt proceedings to sanction discovery abuse are ancillary proceedings without sufficient independence to support a cause of action for malicious prosecution." (*Id.* at p. 639.)

We find *Lossing v. Superior Court* to be persuasive, particularly because both of the adverse considerations we have outlined from *Lossing v. Superior Court* would have arisen in this case.

The cases cited by appellants do not support their position. *Ferraris v. Levy* (1963) 223 Cal.App.2d 408, 411, involved an action brought by an executor under Probate Code section 613 against a person who has concealed or fraudulently disposed of property of the decedent. The court held that such an action was an independent judicial proceeding that could be maliciously prosecuted. It is true that if the defendant in such an action failed to appear the court could order imprisonment for contempt. But it was not the contempt that was the independent judicial proceeding but rather the action instituted by the executor that was the judicial proceeding that could be maliciously instituted and maintained.

Appellants cite to Witkin's former 9th edition (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 432-434), to support their claim that an order to show cause re contempt is a special proceeding that can be maliciously prosecuted.

Two things are true about the authorities digested in the foregoing sections from Witkin's 9th edition of Summary of California Law. First, one of the cases digested, *Chauncey v. Niems* (1986) 182 Cal.App.3d 967, which supports appellants' position, did so in dictum that the court in *Lossing v. Superior Court, supra*, 207 Cal.App.3d at page 638 did not find persuasive. Second, the cases cited in Witkin's 9th edition, as well as in the current 10th edition (5 Witkin, Summary of Cal. Law (10th ed. 2005) §§ 488-490, pp. 715-718), indicate that the trend is to restrict the applicability of malicious prosecution rather than expand it. Illustrative of this trend is the decision in *Bidna v. Rosen* (1993) 19 Cal.App.4th 27. Relying in part on recent Supreme Court jurisprudence, the appellate court in *Bidna v. Rosen* discerned that the tendency is to cure "the evil of abusive litigation at its source rather than allowing it to metastasize into yet more litigation."[6] (*Id*. at p. 37.) That is, inappropriate litigation conduct should be curbed and sanctioned as soon as possible, and in the action in which the misconduct occurred, without sparking a new action. We think that this is both sound policy and good law.

Chauncey v. Niems was a case where the former wife brought an order to show cause re contempt, along with a petition to modify the support order. The wife's petitions were settled by compromise and the former husband then brought an action for malicious prosecution, which was predicated on wife's petitions. (*Chauncey v. Niems*, *supra*, 182 Cal.App.3d at p. 970.) The court found that husband could not allege a favorable termination and that there was an insufficient showing of malice. (*Id.* at pp. 977-978, 980.) This was enough to dispose of husband's action but the appellate court also found that wife's petitions, including the order to show cause re contempt, could support

---

6 After a detailed analysis of malicious prosecution actions arising from family law cases, the court in *Bidna v. Rosen* concluded: "Nevertheless, despite the arguable 'inadequacy' of family law remedies, we hold that no malicious prosecution action may arise out of unsuccessful family law motions or OSC's. The tie breaker is *Sheldon Appel Co. v. Albert & Oliker* [(1989)] 47 Cal.3d 863, which enunciates a basic judicial policy in favor of curing the evil of abusive litigation at its source rather than allowing it to metastasize into yet more litigation." (*Bidna v. Rosen*, *supra*, 19 Cal.App.4th at p. 37.)

husband's action for malicious prosecution because it was sufficiently an "adversarial proceeding." (*Id.* at p. 975.)

The court in *Lossing v. Superior Court*, *supra*, 207 Cal.App.3d at page 637 "strongly" disagreed with the dicta that a malicious prosecution action could be predicated on wife's order to show cause re contempt and gave, among others, the two reasons that we discussed at pages 6-7, *ante*, for its conclusion. We agree with *Lossing*.

Another case cited by appellants, *Norton v. John M.C. Marble Co.* (1939) 30 Cal.App.2d 451, involved a controversy over the arcane practice of a bill of exceptions, which led one of the parties to claim that the opponent's lawyer was guilty of contempt of court. The lawyer in question was convicted of the contempt. The lawyer then filed an action for malicious prosecution. The appellate court affirmed an order sustaining a demurrer without leave to amend because the complaint for malicious prosecution did not adequately allege the lack of probable cause. (*Id.* at p. 455.) The court did not address the issue whether a malicious prosecution action can be predicated on a contempt of court proceeding. In any event, in view of developments since 1939, this appellate decision is only of antiquarian value.

In sum, we conclude that a cause of action for malicious prosecution cannot be predicated on the institution and maintenance of an order to show cause brought to enforce a preliminary injunction.

3. The Litigation Privilege Bars the Remaining Causes of Action

Appellants contend that various actions on respondents' part during the litigation between themselves and Mirage preclude the application of the anti-SLAPP statute and the litigation privilege. Appellants invoke the rule that conduct that is illegal is not protected by the SLAPP statute. The conduct that appellants claim was illegal and thus not protected was: communicating with a party represented by another lawyer; suppressing important evidence; and allowing perjured testimony to be presented.

It is true that when "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter

of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.)

As the court noted in *Flatley v. Mauro*, *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*), disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5, is a leading case on the subject of illegality of conduct in the context of the SLAPP statute. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 316.) In *Paul*, a defeated candidate for city council sued several individuals, alleging that they had influenced the election by illegal campaign contributions. The defendants moved to strike under the SLAPP statute, but their papers showed that they in fact had violated the Political Reform Act of 1974 (Gov. Code, § 81000 et seq.) by making illegal campaign contributions. (*Paul*, *supra*, 85 Cal.App.4th at pp. 1361-1362.)

The Supreme Court in *Flatley v. Mauro, supra*, 39 Cal.4th at page 315, noted that *Paul* "emphasized the narrow circumstance in which a defendant's assertedly protected activity could be found to be illegal as a matter of law and therefore not within the purview of [Code of Civil Procedure] section 425.16." Ultimately, this rule is based on the consideration that activity that is illegal is not constitutionally protected speech. (*Flatley v. Mauro, supra*, at p. 316.) Given the broad scope of the right of free speech, the illegality must either be conceded, as in *Paul*, or it must be clear as a matter of law that the activity was illegal, as in *Flatley v. Mauro*, when uncontroverted evidence showed that the activity was extortion, as that crime is defined by Penal Code section 518.

Whether conceded or found to be the case as a matter of law, the activity must be illegal. That is, the activity must violate a law, which may be a law found in the Penal Code (*Flatley v. Mauro*) or perhaps the Political Reform Act of 1974 (*Paul*), to name two examples.

The conduct, or misconduct, of which appellants accuse respondents, even if true, did not violate a law. The activity of which respondents are accused by appellants may not comport with ethical conduct, but it did not violate a statute or law.

There is a further reason why appellants' claim must be rejected. "If . . . a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step[7] but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 316.) In this case, there is certainly a dispute about whether respondents committed any of the acts of which appellants accuse them; respondents energetically, at some length, explain why they did not commit the misconduct with which they are charged by appellants.[8] Thus, it cannot be said that the matter of illegality is either conceded or is true as a matter of law.

As far as success on the merits is concerned, we agree with the trial court that all of the causes of action other than the three claims for malicious prosecution are barred by the litigation privilege since all of these remaining causes of action are predicated on litigation conduct.[9] The litigation privilege bars all tort causes of action except those for malicious prosecution and it has been broadly held to apply to claims of fraudulent communications, perjured testimony, forged documents and defamation, to name some examples. (*Flatley v. Mauro, supra,* 39 Cal.4th at p. 322.) Thus, appellants cannot prevail on the merits of the fourth through eighth causes of action.

---

7 See footnote 4, *ante*.

8 As with the lengthy recitation of evidentiary facts by appellants, we do not find it necessary to delve into the details of the controversy about what respondents did and said while they were representing Mirage.

9 One exception to this appears to be the allegations of the fifth cause of action about Mirage luring away appellants' employee Krimskiy. As noted, there is no explanation under what legal theory this is actionable, especially in a case against respondents.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J.

BIGELOW, J.